

November 27, 2019

Office of Open Records  
333 Market St., 16th Floor  
Harrisburg, PA 17101-2234

Michael Noone, (Acting) District Attorney  
201 W. Market St., Suite 4450  
West Chester, PA 19380-09089

Dear OOR and D.A. Noone:

I am appealing the Agency's denial, partial denial, or deemed denial of my Right-To-Know Law (RTKL) request because the requested records are public records in the possession, custody or control of the Agency; the records do not qualify for any exemptions under § 708 of the RTKL, are not protected by a privilege, and are not exempt under any Federal or State law or regulation; and the request was sufficiently specific.

**A. Any inadvertent mistakes I made in the form of submitting my request were harmless error.**

The Department first denied my request because I sent my request in an email rather than using the Department's official RTK Request Form or the Standard RTK Request Form, and because I sent the email to the Department's general email address rather than addressing it to the Department's designated open-records officer.

This is my first time requesting records under the RTKL. And while I did technically err in the way in which I sent my request to the Department, any such error was harmless. True, the RTKL does require requesters to address their requests to the agency's designated open-records officer. 65 P.S. § 67.703. But the RTKL also directs all other agency employees to forward RTKL requests to the open-records officer—showing that the General Assembly foresaw that requesters may make the same mistake that I did. See *id.* And the Department's open-records officer clearly got my request in the end, otherwise the Department could not have acknowledged it or denied it.

Thus, any mistakes I made in in the form of submitting my request were harmless error.

**B. My request was sufficiently specific.**

Next, the Department denied my request because it claimed that the request was not sufficiently specific.

When considering a challenge to the specificity of a request under Section 703 of the RTKL, Pennsylvania courts employ a three-part balancing test, examining the extent to which the request sets forth (1) the subject matter of the request; (2) the scope of documents sought; and (3) the timeframe for which records are sought. *Pennsylvania Dep't of Educ. v. Pittsburgh Post-Gazette*, 119 A.3d 1121, 1124 (Pa. Commw. Ct. 2015). My request passes the balancing test.

Regarding the first factor, the subject matter of the request, I have been very clear about what that subject matter is: an incident involving an escaped pet peacock. There can be no confusion about what incident that is, as it attracted intense local and even national media attention.

Regarding the second factor, the scope of documents sought is admittedly broad: all records relating to the incident. However, “a request for a broad category of documents, such as all records, may be sufficiently specific” if appropriately limited. *See Pittsburgh Post-Gazette*, 19 A.3d at 1125–26. Here, while my request does not identify specific individuals or email addresses within the Department who may have responsive records, the subject matter of my request—an escaped peacock—is likely so unusual that the Department will know who is likely to have records relating to it. Thus, the breadth of my request does not make it unduly burdensome.

Regarding the third factor, my request concerns an incident that took place on or around September 8, 2018—less than a year-and-a-half ago. Thus, the Department will not have to search for any records originating prior to the date of the incident.

Thus, the Department erred in dismissing my request as not sufficiently specific.

**C. The Department has failed to meet its burden of showing that the records it is withholding are exempt from disclosure.**

Finally, the Department denied my request because “[n]otwithstanding the above two reasons, as permitted by Section 708 of the RTKL, the withheld information is exempt from disclosure under Sections 708 (b)16 and 17 of the RTKL [exempting records related to or resulting in a criminal or noncriminal investigation].” As demonstrated below, however, the Department’s blanket invocation of these exemptions fails as a matter of law.

In *Pennsylvania State Police v. Grove*, the Pennsylvania Supreme Court recognized that the police have the burden to demonstrate by a preponderance of evidence which of its records are exempt from disclosure under the RTKL. 161 A.3d 877, 892 (Pa. 2017). The *Grove* Court also emphasized that “the mere fact that a record has some connection to a criminal proceeding does not automatically exempt it under Section 708(b)(16) of the RTKL.” *See id.* at 888. Moreover, “exceptions to disclosure of public records must be narrowly construed.” *Id.* at 892 (2017). Accordingly, the *Grove* Court hold whether a police record contains criminal investigative material “must be determined on a case-by-case basis.” *See id.* at 894.

Here, the Department acknowledges that it is withholding responsive records, but it fails to identify what the records are or present any evidence that the records contain criminal investigative material. As such, the Department has not met its burden to show that the records are exempt from disclosure. *See Grove*, 161 A.3d at 882 (where the police failed to submit any evidence that requested records were exempt from disclosure as investigative records, the police failed to meet their burden.)

These arguments apply with equal force with regard to the exemption for non-criminal investigations under Section 708(b)(17): the Department has the burden; the Department acknowledges that there are responsive documents but does not identify them; and the Department presents no evidence supporting its claim of exemption. Thus, the Department’s blanket invocation of this exemption fails here too.

### **Conclusion**

For all these reasons, ORR should require the Department to release to me the records that it is withholding without delay.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nick Marritz", with a large, stylized flourish at the end.

Nicholas Marritz